No. 14329

United States Court of Appeals

for the Ninth Circuit

RAYONIER INCORPORATED, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-18-54

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 3533

RAYONIER INCORPORATED, a Delaware Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

Plaintiff, Rayonier Incorporated, for cause of action against defendant, United States of America, complains and alleges as follows:

I.

Jurisdiction of the above-entitled court for this action is claimed and acquired under Title 28 of the United States Code, Sections 2671 to 2680, inclusive, commonly known as the "Federal Tort Claims Act," the United States of America being defendant, and Title 28 of the United States Code, Section 1346; and is also claimed and acquired because the acts and omissions herein complained of and the damage to plaintiff's property herein described occurred within the Western District of Washington, Northern Division.

II.

Plaintiff is now and was at all times herein men-

tioned a corporation duly organized and existing under the laws of the State of Delaware and authorized to do business in the State of Washington, and all license fees and other charges due the State of Washington from plaintiff have been paid. Plaintiff has places of business in the State of Washington, among other places, at Seattle, King County, Washington, and Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington of the above court. The acts and omissions herein complained of and the property damage herein described occurred in Clallam County, Washington, within the jurisdiction of the above court.

III.

Plaintiff's principal business is the manufacture of pulp, and in connection therewith it owns or has cutting contracts with respect to extensive stands of timber, owns extensive areas of lands having young and growing timber, conducts, both directly and through independent logging contractors, extensive logging operations, and owns and operates pulp mills, logging railroads, logging camps, telephone systems, truck roads and other facilities, both within Clallam County, Washington, and in other places in the State of Washington, principally on what is known as the "Olympic Peninsula." Included in its ownerships at all times herein mentioned were the land and timber particularly described in Exhibits A and B attached hereto and hereby made a part hereof, the lands described in Exhibit A com-

prising approximately 8,698 acres, and the lands described in Exhibit B comprising approximately 1,672 acres.

IV.

At the times herein referred to plaintiff was party to two so-called "Timber Sales Contracts" with the Department of Agriculture, Forest Service, of the United States of America, under the terms of which plaintiff has the right and obligation to purchase, cut and pay for certain timber owned by defendant. Said Timber Sales Contracts are identified as follows:

(a) No. 17345—Date of sale, May 11, 1948, covering about 720 acres in the Calawah River Watershed in Townships 28 North, Range 11 West; 28 North, Range 12 West; 29 North, Range 11 West; 29 North, Range 12 West, Clallam County, Washington.

(b) No. 22912—Date of sale, June 5, 1951, covering about 299 acres in the Sitkum River Watershed in Townships 28 North, Range 12 West and 29 North, Range 12 West, Clallam County, Washington.

On September 20, 1951, there remained uncut timber which plaintiff had the right and obligation to purchase, cut and pay for under said Timber Sales Contracts.

V.

At the times herein referred to the defendant owned extensive lands and timberlands in Clallam

County, Washington, many of which are adjacent to or in the general vicinity of plaintiff's lands described in Exhibits A and B, and also were the site of, adjacent to or in the general vicinity of the place where the acts and omissions herein complained of occurred. Many of said lands and timberlands owned by the defendant are administered by the Department of Agriculture, Forest Service, of the United States of America. Much of the timber so administered by the Forest Service is held, managed, operated and administered upon to be sold to private parties for cutting for commercial and industrial purposes, and for pecuniary gain and profit to defendant, and its lands herein described on which fire originated were and are held for purpose of pecuniary gain and profit to defendant.

VI.

A large area (herein called the "Forest Service Protective Area"), which embraced and included all of the lands referred to in this complaint, and extending from a North-South line located east of the lands herein referred to, westerly to a North-South line just east of the town of Forks, Clallam County, Washington, had, prior to August 6, 1951, been established by agreement between defendant, through the Forest Service, and the State of Washington. By said agreement the Forest Service agreed to protect certain lands, including plaintiff's lands and the 1600-acre area hereinafter referred to, against fire and to take immediate vigorous action to control all fires originating on or threaten-

ing such lands, regardless of the type of forest growth or cover being burned or threatened. Said agreement also provided, among other things, as follows:

> "9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of said forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federals laws, or under general law."

Said agreement between defendant and the State of Washington was in effect at all times herein mentioned. Plaintiff, in common with most other owners and operators of timber and timberlands in the area, knew at all times herein mentioned and prior thereto of the establishment and existence of said Forest Service Protective Area and, in general, of the duties and obligations of the Forest Service within the Forest Service Protective Area.

VII.

As one owner and operator of lands and timber within the Forest Service Protective Area, including all of defendant's lands referred to in this complaint, it was the duty of defendant, under the law

and statutes of the State of Washington, not to do any act which would expose any of the forests or timber within said area to the hazard of fire, to abate any hazard, such as inflammable debris likely to further the spread of fire, on defendant's lands, and to make every reasonable effort to control and extinguish the fire which occurred on defendant's lands as hereinafter set forth. The following statutes of the State of Washington were in force and effect at all times herein mentioned, namely: R. C. W. §76.04.050 (Rem. Rev. St. §5818); R. C. W. §76.04.370 (Rem. Rev. St. §5807); and R. C. W. §76.04.380 (Rem. Rev. St.—1945 Suppl. §5806).

VIII.

At all times herein mentioned Sanford M. Floe was employed by the defendant as District Ranger for the Forest Service for the Soleduck District, which district included the Forest Service Protective Area. The District Ranger and his assistants and subordinates had numerous duties, such as and including the carrying out of forestry practices, observation and inspection of road construction and logging operations in timber being purchased from defendant, checking on hunters, fishermen, campers and recreationists, giving information to the public and to persons interested in the district and its various features and activities, and, in general, acting as caretakers of defendant's land. As such caretakers, the District Ranger, his assistants and subordinates had the duty to see that defendant's

lands were maintained and kept in the manner required of such landowners by the law and statutes of the State of Washington. In the performance of said duties they were supposed to inspect and patrol defendant's lands and other lands within the Forest Service Protective Area, to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire and, when fire occurred within said area, to fight and use every reasonable effort to control and extinguish the same and to supervise, direct and control activities in fighting and suppressing such fires. At all times herein mentioned, L. J. Evans was employed by the defendant as District Assistant Ranger of the Forest Service for the Soleduck District, and he was immediately subordinate to District Ranger Floe and assisted Mr. Floe in the performance of his duties. Said District Ranger and his District Assistant Rangers were authorized and empowered to employ, hire, rent and use all men, equipment, tools and materials reasonably necessary to fight, suppress and extinguish fires within the Forest Service Protective Area. In order that they might more effectively carry out their several duties described in this paragraph and elsewhere in this complaint, District Ranger Floe, District Assistant Ranger Evans and other subordinates of Floe were, as were some employees of private timber owners in the area having similar duties, Washington State Fire Wardens. As State Fire Wardens, they had the power and authority to summon and impress help in the prevention, suppression and

control of forest fires. Plaintiff, in common with other owners and operators of timber and timberlands in the area, knew at all times herein mentioned and prior thereto of the aforesaid duties, authority and powers of Messrs. Floe and Evans and their subordinates.

IX.

The acts and omissions of defendant's employees herein described or complained of were within the scope and course of their employment by the defendant and occurred while they were performing their duties as employees of the defendant. Their negligence was the negligence of defendant.

X.

In the areas referred to in this complaint virtually no rain had fallen for four months prior to August 6, 1951, and very little rain fell after that date until after September 20, 1951. Because of the weather conditions the areas in which the fires referred to in this complaint occurred were extremely dry and there was acute fire hazard. Dry winds were not uncommon in the Soleduck River valley, within which the fires herein described originated. Such winds not only added to the dryness and combustibility of fuels, but also greatly increased the danger and hazard of the spread of fire. The facts and circumstances described in this paragraph were known or, in the performance of their duties, should have been known to District Ranger Floe and District Assistant Ranger Evans and other employees of the Forest Service in the Soleduck District.

XI.

At all times herein mentioned and for a number of years prior thereto defendant owned had control of and free and unrestricted access to the following described lands, including the right of way of the Port Angeles Western Railroad across said lands, to wit: The North half of the Southeast quarter (N½ of SE¼) and Government Lots Seven (7) and Eight (8), in Section Thirty (30), Township Thirty (30) North, Range Ten (10) West of the Willamette Meridian, and Lot Eleven (11) and the Southwest quarter of the Southwest quarter (SW¼ of SW¼) of Section Twenty-five (25), Township Thirty (30) North, Range Eleven (11) West of the Willamette Meridian, all in Clallam County, Washington. Upon said described lands there were railroad tracks of the Port Angeles Western Railroad over which were regularly operated locomotives and logging trains by said railroad. The locomotives and other equipment which said railroad operated over said tracks were, in a number of respects, defective and deficient, were without adequate or proper spark arresters, were poorly maintained and, not uncommonly, threw sparks both from the stacks and from friction occurring in various parts of the locomotives and other equipment and in their contact with the ground or rails over which they ran. The legal subdivisions above described and the right of way through said legal subdivisions were, on August 6, 1951, and for a number of years prior thereto had been covered with trees of various sizes, both standing and down, accumulations of rotten

ties, logging and land clearing debris, inflammable growing grasses and bushes, and many of the ties supporting the railroad tracks were also rotten. All the facts and circumstances described in this paragraph were known, or in the exercise of their duties should have been known, to District Ranger Floe, District Assistant Ranger Evans and other employees of defendant. Defendant could have abated or caused to be abated prior to August 6, 1951, the above-described conditions and practices on the above-described lands and right of way, but failed to do so.

XII

Near the hour of noon on August 6, 1951, approximately six fires occurred on and in the vicinity of the right of way across the above-described legal subdivisions, which fires burned simultaneously and were caused by a passing train of the Port Angeles Western Railroad. Said train did not have a following speeder or other equipment with men to watch for fires which might be caused by the train, as required by the statutes of the State of Washington. It was common practice of said Railroad not to have its trains followed up by speeder or other equipment with men watching for fires. Prior to August 6, 1951, the defendant and District Ranger Floe had called the attention of the Port Angeles Western Railroad to its failure to observe the practices above stated and to its operation of deficient and defective equipment, and had requested said Railroad to correct the same and observe fire

prevention practices. The Railroad failed and neglected to do anything about it. On and in the immediate vicinity of the above-described legal subdivisions and of the fires caused as aforesaid were stands of young growing timber, and within a short distance were stands of older and mature timber. The defendant and its employees had the right and as owner of said land, the duty to go upon the above-described lands and the railroad right of way to take any action necessary or proper to abate conditions and practices thereon which constituted a fire hazard, but they failed and neglected to take any such action. All of the facts and circumstances described in this paragraph were known or, in the exercise of their duties, should have been known to District Ranger Floe, District Assistant Ranger Evans and other employees of the defendant.

XIII.

Shortly after commencement of the fires referred to in paragraph XII, District Ranger Floe and his subordinates were notified of said fires and he then dispatched six men to extinguish the same. The men so dispatched took with them only light hand tools. They did not take with them a portable radio. More men, tools and equipment and radio equipment to permit constant communication with the District Ranger Station were available and could have been dispatched and sent to the scene of the fires.

XIV.

Upon being informed of the fires referred to in paragraph XII, District Ranger Floe and his

subordinates immediately assumed, took and exercised exclusive supervision, direction and control of all activities in connection with the fighting and suppression of the fires, and at all times thereafter, through and including the times referred to in this complaint, continued to and did assume, take and exercise exclusive supervision, direction and control of the fighting and suppression of all fires referred to in this complaint. Plaintiff, in common with other owners and operators of timber and timberlands in the areas referred to in this complaint, knew of the facts described in this paragraph and relied upon District Ranger Floe and his subordinates to continue to carry on said activities at all times referred to in this complaint.

XV.

The men dispatched as aforesaid failed to extinguish one of the fires originating as stated in paragraph XII and said fire spread until it covered an area of approximately 60 acres. It was contained within said area by late afternoon on August 6, 1951, after additional men and equipment had been brought to the scene of the fire. During the night of August 6 and August 7, a few men were left at the scene of the fire, but a larger crew to resume the fire fighting did not report for duty until 7 o'clock a.m. on August 7, which is the hour at which they were directed by District Ranger Floe or his subordinates to report. Daylight occurred on August 7 at about 4 o'clock a.m. Large crews of men and much equipment could and would

have reported for duty to commence fire fighting at daybreak had the District Ranger or his subordinates so instructed them. It is common knowledge in the timber industries and was known or should have been known by District Ranger Floe and his subordinates that one of the most effective hours to fight fires such as those above described is the period immediately after daybreak.

XVI.

Had fire fighting been commenced at daybreak on August 7 and had additional men, tools and equipment been employed in fighting said fire, the same could have been completely controlled on the morning of August 7, 1951, and the spread of the fire and damage hereinafter referred to could and would have been avoided, which facts District Ranger Floe and his subordinates knew or should have known.

XVII.

At about 2:30 o'clock p.m. on August 7, 1951, the fire above described broke through or jumped over the lines within which it had theretofore been contained and spread in Southeasterly, Southerly and Southwesterly directions over an area of approximately 1,600 acres (which is hereinafter sometimes referred to as the "1600-acre area"). Said fire was contained and under control by about August 11, 1951. Thereafter and until the early morning of September 20, 1951, the fire continued mostly in smoldering form, but during said period there was no uncontrollable fire within the 1600-acre area.

XVIII.

In the general vicinity of the land referred to in this complaint the forest industries provide the primary occupation and means of livelihood of the residents, and protection and preservation of the forest is a matter of first concern, both to residents of the area and to the timber and mill owners and operators. As a consequence, most men willingly and voluntarily respond to calls for assistance in fighting fires and owners of equipment willingly and voluntarily furnish their equipment when called for to fight fires, regardless of whether such call is made by private or public timber and land owners or operators. Similarly, timber owners and operators knew what men and equipment were available to fight fires and how to reach them if necessary, and on appropriate occasion did call upon them. A Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest to be followed and employed by District Ranger Floe and his subordinates. Said plan was in effect at all times herein mentioned. Said plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Forest Service Protective Area, and the method of getting such men and equipment promptly to the scene of the fire. Said men and equipment were available at all times herein mentioned. Said Fire Suppression Plan contemplated that the District Ranger and his subordinates would call upon and use all men

and equipment necessary to suppress and extinguish all fires within the Forest Service Protective Area as promptly as possible, and as caretakers of defendant's lands it was one of the duties of the District Ranger and his subordinates to call upon and use such men and equipment. The defendant did not own, maintain or operate a fire department or fire-fighting organization, as such, in the Soleduck District, but, just as other owners and operators of timber and timberslands in the area, had men and equipment available to fight fires and knew where additional men and equipment available to fight fires could readily and quickly be obtained.

XIX.

In addition to the men and equipment described and listed in the Fire Suppression Plan, there were hundreds of other privately employed men and a great deal of other privately owned equipment in the vicinity which were available and could have been used to fight, suppress and extinguish fires and do mop-up work on August 6 and 7, 1951, and thereafter on and about the 1600-acre area, the quantity of equipment and number of men being practically limitless so far as fire suppression and mop-up activities in the area were concerned. The men referred to in this paragraph and in the immediately preceding paragraph would have responded promptly, and the equipment referred to in this paragraph and in the immediately preceding paragraph would have been made immediately available to the Forest Service and District Ranger Floe and

his subordinates on their request. Said facts were known or should have been known to District Ranger Floe and his subordinates.

XX.

District Ranger Floe and his subordinates failed to summon, use and employ men, equipment and materials available to them under the Fire Suppression Plan and otherwise when and in the numbers and quantities that they should have or which said Plan contemplated or which they had power and authority to summon, use and employ, and which they knew or should have known would have been required in order to suppress and extinguish the fires above described and which prudence and due care dictated they should have used and employed.

XXI.

The 1600-acre area, including the westerly portion thereof, contained a great deal of logging debris, stumps, logs and wood chunks. Within and near the westerly boundary of the 1600-acre area was a so-called "landing" which had previously been used in logging operations as a point to which logs were yarded and loaded onto trucks. Said landing contained a great deal of logging debris, including logs, chunks, bark, limbs and dead and rotting vegetation. Said landing was largely covered by dirt in order to make the surface usable, but the accumulations underneath the dirt were such as to permit burning of said debris and the entry of air into that debris.

Said landing is located at an altitude of approximately 2,000 feet on a ridge which was exposed to winds which could sweep across said landing and onto nearby slash and timber areas. During all times herein mentioned it was common knowledge and was known to District Ranger Floe and District Assistant Ranger Evans, or in the course of their employment should have been known to each of them, that smoldering fires burn in such debris, logs, stumps, chunks and bark, and in accumulations thereof such as existed in said landing and elsewhere in the 1600-acre area, for long periods of time when no flames are visible, and that such smoldering fires may be whipped into flame and sparks and burning materials carried from such debris and other forest materials by the wind. The landing above referred to and the greater portion of the westerly part of the 1600-acre area were in close proximity to unburned areas on which there were slash, young growth and mature timber, all of which facts were known or should have been known to District Ranger Floe and District Assistant Ranger Evans and their subordinates.

XXII.

Two rivers, the Soleduck and Camp Creek, run through and are immediately adjacent to the 1600-acre area and the areas to which the fire was confined on August 6 and 7, 1951. Each river had more than enough water to supply all conceivable requirements of water in fighting the fire prior to September 20, 1951. Water could be procured from

both rivers in fighting fire, through pumps and hoses directly to the fire, and through tank trucks and pack cans by which water could be hauled or carried to all parts of the area.

XXIII.

Usable and safe roads existed during all times herein mentioned, both within the 1600-acre tract and in the lands adjacent thereto, to provide access to and egress from all parts of the 1600-acre area. Also, the tracks of the Port Angeles Western Railroad served the area and were available for use with railroad equipment.

XXIV.

For several days immediately prior to September 20, 1951, the temperature in the areas referred to in this complaint had been warm; the weather forecasts (including those forecasts made by the U. S. Weather Bureau) were for higher temperatures, decreasing humidity and northeasterly winds. It is common knowledge in the vicinity and was known or should have been known by District Ranger Floe and District Assistant Ranger Evans that northeasterly winds in that vicinity during that time of year were dry winds, usually accompanied by warm temperatures and low humidity. Messrs. Floe and Evans knew, or in the course of their duties as District Ranger and District Assistant Ranger should have known, of the aforesaid weather forecasts and of the temperatures and humidity, and that the weather conditions aforesaid made various

fuels in the area very susceptible to fire and the spread of fire.

XXV.

For many miles westerly and southerly from the 1600-acre area there are extensive and unbroken stands of timber, cutover lands and lands with young forest growth on them, having a value of many millions of dollars. Messrs. Floe and Evans knew, or in the performance of their duties should have known, that any fire in the 1600-acre area would endanger and jeopardize said timber and timberlands, and that if fire broke out in that area accompanied by Northeasterly winds the fire would spread rapidly to the west and south, would become beyond control, would continue for great distances and would cause great damage.

XXVI.

During the period from August 11, when the fire in the 1600-acre area was contained and controlled, until September 20, 1951, fires continued to smolder in the debris, bark, logs, stumps, wood chunks and the landing above referred to, which fact was known or should have been known by Messrs. Floe and Evans and their subordinates on the job. During that period District Ranger Floe and District Assistant Ranger Evans supervised and directed operations on the 1600-acre area, but failed to extinguish all fire in the area, including fires smoldering as aforesaid. During said time Messrs. Floe and Evans employed only a few men and a few items of equipment and tools on and about the 1600-acre

area, although they had the power and authority, and at all times were able, to use many more men and a great deal more equipment and tools in such operations, and they could have completely extinguished all fire in the 1600-acre area, and especially in the westerly portion thereof which was in close proximity to unburned slash, timber and other inflammable materials. They likewise failed to break up the aforesaid landing and disperse and expose the accumulations of debris, wood, bark, logs, chunks and other inflammable materials in said landing, although they could have done so during said period. During said period they did not use sufficient water to extinguish the fires burning as aforesaid, although sufficient water, equipment and manpower were available for that purpose. They likewise failed to maintain night patrols around said 1600-acre area, and especially near the westerly border thereof, although men and equipment for that purpose were available and there were ample roads for ingress and egress to and from the area.

XXVII.

District Ranger Floe, District Assistant Ranger Evans and other subordinates of Mr. Floe knew at all times between August 11 and September 20, 1951, that fires were smoldering within the 1600-acre area during that period. On about September 13, 1951, a northeasterly wind of not unusual velocity blew sparks out of smoldering debris in or near the landing described in paragraph XXI and jumped the

westerly fire trail around said area into the adjacent unburned combustible materials, and caused fires to flare up, which incident occurred and was observed while men were present, and as a consequence the fire so caused was extinguished. Frequently throughout the above-mentioned period smokes and flames would appear in various places in the 1600-acre area which were seen by District Ranger Floe or his various subordinates. During said period Mr. Floe, through personal observation, was aware of the fire burning in the landing.

XXVIII.

District Ranger Floe and his subordinates knew or should have known that winds in the Soleduck valley increased in intensity and force as the elevations increased The elevations in the 1600-acre area range from approximately 1,000 to 2,500 feet above sea level. The immediately adjacent country ranges up to even higher elevations.

XXIX.

At no time during the month of September, 1951, prior to September 20 did District Ranger Floe or his subordinates maintain or cause to be maintained a night patrol crew or night watchman in or near the vicinity of the 1600-acre area, nor a night lookout at the established North Point Lookout Station on a nearby mountain, which commanded a view of said entire area. Under the conditions then prevailing in said area, as hereinabove described, a reasonably prudent man in the position of District

Ranger Floe or District Assistant Ranger Evans would have maintained night patrols and watchmen and night lookout.

XXX.

In the early morning of September 20, 1951, a northeasterly wind of not unusual force blew across the 1600-acre area and blew sparks and burning material from the debris, logs, bark, stumps, wood chunks and the landing above referred to or other burning materials in or near the westerly portion of the 1600-acre area, and carried the same into the timber, young growth, brush, slash and other inflammable material lying westerly and southerly from the 1600-acre area. Said sparks caused fire in the last-described materials and timber, and said fires spread rapidly to the west and south and to some extent to the east, burning timber, young growth, bridges, equipment, railroads, telephone lines and other property, including that hereinafter more specifically described, and causing the damage hereinafter described. Said fire and said damage were the direct and proximate result of the escapement of sparks and burning materials from the 1600-acre area. The fire so caused was not discovered until after it had been burning for some time and until it reached a stage where it was uncontrollable. The fire was discovered by someone other than District Ranger Floe or any of his subordinates.

XXXI.

For several days following the outbreak of the fire on September 20, 1951, the fire burned an area

extending approximately 20 miles in a northeast-southwest direction, and various distances up to 5 miles in a north-south direction, causing damage to plaintiff as hereinafter set forth.

XXXII.

The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951, and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by District Ranger Floe and his subordinates.

XXXIII.

Had men, tools, equipment, water and supplies been maintained on hand during the night of September 19 and September 20, the sparks and burning materials which carried into the adjacent slash and timber could have been suppressed or any fires created by such sparks and burning materials could have been immediately suppressed. All necessary men, tools, equipment, water and supplies were available at that time and could have been so used and employed by District Ranger Floe and his subordinates.

XXXIV.

The use and employment of additional men, tools,

equipment, water and supplies in the manner described above would have been availed of by a reasonably prudent owner of lands and timber and by a reasonably prudent person having any duty or responsibility in the fighting and suppression of the fires above described, and such action would have been consistent with sound, careful and prudent practice. Failure to take such action under the conditions and circumstances above described was imprudent, careless, negligent and in disregard of responsibility for and the care and safety of property and in disregard of the responsibility and duty of a landowner.

XXXV.

Under the facts, circumstances and conditions described in this complaint, District Ranger Floe and his subordinates, including District Assistant Ranger Evans, were negligent in the following particulars:

(a) In permitting the existence of the fire hazard on defendant's lands as described in paragraph XI hereof and in failing and neglecting to abate the same;

(b) In permitting the operation of defective and deficient equipment of Port Angeles Western Railroad in the manner and on the lands described in paragraph XI, and in failing to require Port Angeles Western Railroad to follow up its trains with speeders or other equipment with men to watch for fires caused by trains, as stated in paragraph

XI, and in failing to abate said operations and practices;

(c) In failing to dispatch adequate and sufficient men, tools and equipment to extinguish the fires which broke out on August 6, 1951;

(d) In failing to patrol and extinguish all fires on August 6 and August 7, 1951, by not utilizing and employing sufficient manpower, tools, equipment, water and supplies;

(e) In failing to dispatch and put to work in fighting the fire large numbers of men and quantities of tools, equipment, water and supplies by daybreak or shortly thereafter on August 7, 1951;

(f) In failing to hunt for, discover and extinguish all fire and burning material in the 1600-acre area and every part thereof, including the landing described in paragraph XXI, on and between August 11 and September 19, 1951;

(g) In failing to observe, recognize and take appropriate action and precautions because of the fire hazard created by the weather and indicated by weather forecasts during all times on and between August 6, 1951, and September 20, 1951;

(h) In failing to use and employ adequate men, tools, equipment, water and supplies on and about the 1600-acre area, including the landing described in paragraph XXI, to completely extinguish all fires therein between August 11 and September 19, 1951, when they and each of them knew or should

have known of the hazardous fire conditions and the possibility of fire breaking out and causing extensive damage;

(i) In failing to maintain a patrol, watchman or crew on and about the 1600-acre area throughout the day and night between August 11 and September 20, 1951;

(j) In failing to maintain at all times throughout the day and night a lookout or lookouts to watch for the blowing of sparks and burning material and commencement of fires in and in the vicinity of the 1600-acre area;

(k) In failing to break up, disperse, expose and dispose of the landing referred to in paragraph XXI hereof, and to extinguish every vestige of fire in the materials in and about said landing;

(l) In reducing the size of the crews of men and the quantity of equipment and tools which had originally been employed on and about the 1600-acre area, and in reducing the size of said force to two men on September 19, 1951, in spite of the weather forecasts and humidity readings as alleged above;

(m) In failing to use and employ large crews and a great deal of equipment on and about the 1600-acre area on the one occasion when there was appreciable rainfall in said area between August 11 and September 20, 1951, at which time the use and employment of men and equipment would have been most effective;

(n) In failing to carry out and put into effect the Fire Suppression Plan referred to in paragraph XVIII hereof and to employ and use all men, tools and equipment available under said Plan and available otherwise, and to employ and use them promptly when the need therefor arose;

(o) In failing to use sufficient water to extinguish all fire, when sufficient water for said purpose was at all times available.

XXXVI.

Each and every one of the acts and omissions of defendant's employees, including District Ranger Floe and District Assistant Ranger Evans and their subordinates, and each of them, hereinabove described directly and proximately caused and contributed to the fire which broke out on September 20, and the damage caused by said fire and the damages and loss sustained and suffered by plaintiff as herein alleged.

XXXVII.

Mature timber killed, but not totally destroyed by fire can be salvaged if logged promptly. After being killed certain species deteriorate more rapidly than others, both through natural processes of decay and because of bugs and worms which attack them.

XXXVIII.

As a direct, natural and proximate result of the fire hereinabove described and of the negligent acts and ommissions of the defendant and of District Ranger Floe and his subordinates, and each of them,

herein described and complained of, plaintiff sustained and suffered the following damage and loss:

(a) The young growing timber and seedlings owned by plaintiff on the lands described in Exhibit A were totally destroyed and said lands were otherwise damaged. The difference in values, immediately before and after the fire, of the lands described in Exhibit A, including the young timber thereon, is the sum of $212,955.50, and plaintiff was thereby damaged in that amount.

(b) The mature merchantable timber owned by plaintiff on the lands described in Exhibit B was damaged or destroyed, and deterioration of damaged timber has continued since the fire. The loss in value of said timber as a direct and proximate result of said fire and said negligence is the sum of $374,035.00, and plaintiff was thereby damaged in that amount.

(c) The lands owned by plaintiff described in Exhibit B were damaged. The difference in values, immediately before and after the fire, of the lands described in Exhibit B is the sum of $8,360.00, and plaintiff was thereby damaged in that amount.

(d) Timber which plaintiff had the right and obligation to purchase, cut and pay for under the two Timber Sales Contracts described in paragraph IV hereof was damaged and deterioration thereof has continued since the fire. The loss in value of said timber as a direct and proximate result of said fire

and said negligence is the sum of $189,444.40, and plaintiff was thereby damaged in that amount.

(e) Approximately 6.60 miles of railroad line and track owned by plaintiff was damaged and destroyed, causing damage to plaintiff in the amount of $89,171.30.

(f) Approximately 3.66 miles of railroad line and track between said burned portion of plaintiff's railroad line and its junction with plaintiff's main line railroad near Sappho, Washington, was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of $48,782.29.

(g) Plaintiff's railroad bridge across the Soleduck River near plaintiff's Sappho camp was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of $13,649.66.

(h) Approximately 5.32 miles of telephone system owned by plaintiff was totally destroyed, to plaintiff's damage in the amount of $3,407.00.

(i) Approximately 2.88 miles of telephone line owned by plaintiff between the burned portion thereof and plaintiff's camp at Sappho, Washington, was rendered useless and has had to be abandoned, to plaintiff's damage in the amount of $1,889.00.

(j) Plaintiff helped fight said fire, which work was required by law and was necessary in order to do as much as possible to prevent the spread of the fire and to save other property from damage or destruction. In such fire fighting plaintiff incurred

expenses, both in labor and in use of equipment, for which it has not been paid or reimbursed, in the amount of $16,184.29, and plaintiff was thereby damaged in that amount.

(k) In order to salvage such property as it could from the fire, determine the extent and nature of the loss and perform engineering and field work in connection therewith, plaintiff incurred expenses in the amount of $11,073.08, for which it has not been reimbursed, and plaintiff was thereby damaged in that amount.

(l) In order to salvage timber killed by said fire, it was necessary for plaintiff to alter its logging program and to concentrate on the logging of fire-killed timber. This course resulted in plaintiff having to partially abandon or temporarily abandon other logging operations and logging camps and several logging roads for a period of approximately three years. The fair and reasonable value of said logging camps and logging roads and the deterioration or depreciation thereof as a direct and proximate result of said fire and negligence is the sum of $53,488.00, and plaintiff has been damaged in that amount.

(m) Also as a result of alteration of its logging program described in item (1) above, plaintiff halted certain road construction, as a result of which roads were not built into certain areas where plaintiff had been falling timber and bucking the same into logs. The logs so produced have had to remain on the ground and have deteriorated and will con-

tinue to deteriorate and become a total loss before plaintiff, in its logging operations, can recover them. Said logs, having a volume of approximately 5,992,000 feet, board measure, had a fair value of $107,856.00, and by reason of the loss thereof plaintiff has been damaged in that amount.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $1,130,295.52, for its costs and disbursements incurred herein, and for such other and further relief as to the court may seem just and proper.

HOLMAN, MICKLELWAIT,
MARION, BLACK & PERKINS,
/s/ LUCIEN F. MARION,
Attorneys for Plaintiff.

Copy Received 2/19/54.

F. N. CUSHMAN,
Assistant U. S. Attorney.

EXHIBIT A

Reproduction Lands Burned

Twp.	Range	Sec.	Sub-division	Acres
29N	11WWM	8	E½ (partial)	318
		9	W½NE, E½NW, S½S½	320
		10	NESW, N½SE, SESE	160
		16	NWNE, N½NW, SWNW	160
		17	E½NE, S½SWNE, S½S½NW, S½	460
		18	S½SENE, SE¼	180
		19	S½NE (partial)	78
		20	NE¼, S½NW	240
		21	NW¼ (partial)	120
29N	12WWM	11	SESW, SWSE, W½SESE (partial)	32
		13	S½N½SW, S½SW, SWSE, S½SESE	180
		14	NWNE, N½NW, N½SWNW, SE¼ (partial)	276
		15	NE¼, W½ less W½NWNW, N½NESE, W½SE (partial)	375
		20	SE¼ (partial)	132
		21	NE¼, SW¼, N½SE, SWSE (partial)	429
		22	S½NWNE, SWNE, S½SENE, W½, SE¼	560
		23	N½NE, E½SWNE, SENE, S½N½SW, S½SW, SE¼ (partial)	406
		24	N½, SW¼, W½SE (partial)	539
		25	NWNE	40
		26	NW¼ (partial)	155
		27	NE¼, N½NW, SWNW, S½ (partial)	526
		28	All	640
		29	E½ (partial)	318
		31	NENE, S½NE, SESW, SE¼ (partial)	180
		32	NWNE, S½NE, NWNW, S½NW, SW¼, S½SE (partial)	359
		33	N½NE, SWNE, NW¼, NESW, S½SW, SWSE (partial)	308
		34	NWNW, S½SW (partial)	20
		35	SW¼ (partial)	35
29N	13WWM	26	SWSE (partial)	5
		27	S½SE (partial)	17
		33	NESE, S½SE (partial)	39
		34	E½NE, SENW, S½ (partial)	384
		35	NWNE, S½NE, S½NW, S½ (partial)	437

28N	13WWM	2	Lots 1, 4, NWSW, E½SWSW (partial)	45
		3	Lots 1, 4, NW½W½SENW (partial)	80
		4	Lots 4, 7, NESW (partial)	69
		8	S½NE (partial)	45
		9	N½SWNW, SWSWNW (partial)	18
		11	NWNE (partial)	8
		15	NENW (partial)	5
				8,698

EXHIBIT B

Timbered Lands Burned

Twp.	Range	Sec.	Sub-division	Acres
29N	11WWM	19	S½NE (partial)	2
		21	NENW, S½NW (partial)	40
29N	12WWM	15	SWNE, NW¼, N½SW, SWSW (partial)	91
		20	N½SE (partial)	28
		21	N½NE, SWNE, N½SW (partial)	11
		23	SE¼ (partial)	14
		24	SENE (partial)	21
		26	NWNW (partial)	5
		27	NENE, N½NW, SWNW, SESW, NESE, S½SE (partial)	74
		29	NWNE (partial)	2
		31	NENE, SWNE, SESW, N½SE, SESE (partial)	140
		32	NWNE, W½NW, W½SW, S½SE (partial)	121
		33	NE¼, SENW, NESW, SWSW, SE¼ (partial)	292
		34	N½, SW¼, N½SE, SWSE (partial)	580
		35	SW¼ (partial)	125
29N	13WWM	35	NWNE, S½NE, S½NW, SESE (partial)	78
28N	13WWM	2	Lots 1, 4, NWSW (partial)	48
				1,672

[Endorsed]: Filed February 19, 1954.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3533

RAYONIER INCORPORATED, a Delaware Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF COURT'S ORAL REMARKS

In the above-entitled and numbered cause, given on the 18th day of January, 1954, by the Honorable George H. Boldt, United States District Judge, at Seattle, Washington.

Appearances:

LUCIEN F. MARION, ESQ.,

BURROUGHS B. ANDERSON, ESQ.,

Appeared on Behalf of the Plaintiff, Rayonier Incorporated.

FRANCIS N. CUSHMAN, ESQ.,
Assistant United States Attorney,
Department of Agriculture.

ARNO REIFENBERG, ESQ.,
Assistant United States Attorney.

Appeared on behalf of the Defendant, United States of America.

W. H. FERGUSON, ESQ.,

WILLIAM WESSELHOEFT, ESQ.,

Appeared on Behalf of Plaintiffs, Arthur A. Arnhold, et al., in Cause Number 2956.

DONALD A. SCHMECHEL, ESQ.,

RICHARD E. CALLAHAN, ESQ.,

Appeared on behalf of Port Angeles Western Railroad Company.

ALTHA P. CURRY,

Appeared on Behalf of Fibreboard Products, Inc.

(Whereupon, arguments having been had by counsel upon motion of Defendant to dismiss, the following proceedings were had, to wit:)[3*]

The Court: This matter presents a question that is certainly far free from doubt, at least in my mind.

My general impressions at this time about it are that in the absence of the Dalehite case I would overrule the motion, but the opinion in the Dalehite case gives me grave doubt as to whether or not this claim is within the Federal Tort Liability Act.

Unfortunately, the language of the majority opinion in the Dalehite case in so far as it bears on our problem, is in itself not free from doubt. The

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

difficulty I have is in determining whether or not Floe was acting as a public fireman. If in all of the matters referred to in the complaint he was acting as a public fireman, according to Dalehite there is no action because Justice Reed says in the majority opinion after referring to the Act and a quotation from the Feres case says:

"It——"

namely the Act,

> "——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

Query: Under the allegations of this pleading was Floe acting as a public fireman?

It is clear he was acting as a fireman because [4] everything that is alleged in the complaint is to the effect that he was directly engaged in the matter of fighting fire. So he must have been a fireman no matter how poor a fireman or inadequate a fireman or negligent a fireman, he was clearly a fireman.

Now, that leaves the only question; was he a public fireman under this language of the Dalehite case? And I do not intend to engage in a philosophical debate with the Supreme Court. It is my obligation under the oath that I have taken, to apply the law as laid down by the Supreme Court, even though I might have thought otherwise if it had been presented to me as a matter of first impression.

All right. Does that not narrow the question

down then to the question of whether or not Floe was a public, acting in a public capacity as a fireman?

You put the question that way and it sounds like a rhetorical question. He certainly wasn't acting on his, in his independent capacity. That is alleged with great particularity in the complaint that he was acting in a public capacity, that he was acting as a representative of the United States Forest Service.

He was a fireman and it is very clear that he was a public fireman, no matter how inadequate or negligent or careless in his job, and Justice Reed says in the majority opinion: **[5]**

"It——"

namely the Federal Tort Liability Act,

> "——did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

He goes on to say:

> "There is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire."

Now, it is true in that paragraph he was talking about whether or not a cause of action, tort cause of action, of the character referred to existed prior to the adoption of the Act, but still the language that

is used is very, very unequivocal and very sweeping. The last sentence of that same paragraph he says:

> "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

Is it an unfair thing to say, to paraphrase that language [6] and say:

> "To impose liablity for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure of the Forest Service in fighting a forest fire"?

If you say the one thing, it seems to me you'd surely say the other.

Personally I would prefer to decide the issue after having heard all of the evidence when I might perhaps more adequately judge the nature, extent, character of the capacity of the Forest Service with respect of fighting fire, and yet it seems to me that it would expedite the disposition of this matter if all concerned, both Government and plaintiffs, plaintiff, have a ruling from higher authority than mine on this basic question which, if decided adversely to the plaintiff, disposes of the case. If not so decided, then there would be very extensive proceedings required in order to determine whether in fact Floe was negligent, and if so, whether his negligent acts caused the damage complained of and the nature and extent of the damage.

Gentlemen, I am of the opinion that I am obliged under the Dalehite case, particularly the portions of it that I have referred to and which, incidentally, I have [7] studied and restudied long before today, to sustain the motion to dismiss, basing it entirely on the Dalehite case.

That will be the order of the Court.

Mr. Marion: Your Honor, would it be an imposition to ask you, for the purpose of the record, to state your position on the duties of the Government as a landowner; on whose land the fire originated due to an accumulation of debris; whether or not using a fire department or any other means is controlling of that issue?

The Court: My general impression, if you want that; is that what you——

Mr. Marion: I think quite apart from the Dalehite case.

The Court: My general impression is that on that phase of the case I would not sustain this motion to dismiss, myself on that phase of the case. I—if the Government does not have immunity by virtue of its capacity as a public fireman, my opinion is there is a duty, there would be a duty to exercise reasonable care in confining, controlling and extinguishing fire and consequently I would be of the opinion that the action might be maintained, but for the public capacity of the Forest Service in the matter of fighting fire.

Does that give you what you have in mind, or——

Mr. Marion: May I confer with my [8] "betters," your Honor?

(Whereupon, Mr. Marion conferred with co-counsel.)

Mr. Marion (Continuing): As I understand your Honor, your Honor holds that in taking part in the forest fire fighting activities Mr. Ranger Floe and his subordinates were operating a public fire department or public firemen?

The Court: No, that isn't what I said. I said they were acting as public firemen.

Mr. Marion: And——

The Court: I don't know whether they had a whole department or a regiment or a squad or single individuals, but I think under the language in the Dalehite case if a Government employee is acting in the capacity of a public fireman, whether he be as an individual or whether he be as a troop or a squad or a regiment or what, under that decision there is no liability under the Act.

Mr. Marion: And that applies even though the fire originated on lands owned by the Government for pecuniary gain and profit and due to a condition, an accumulation of inflammable material which, under the statutes of the State, are a nuisance?

The Court: You are going beyond what I think, what I understood your question to call for.

Mr. Marion: I am trying, your Honor, to narrow [9] this down so that we may know precisely the question to be decided.

The complaint alleges, of course, a condition which is a nuisance under the laws of the State of Wash-

ington in that there were accumulations of debris and so forth. This condition existed on the lands owned by and subject to control of the Government. Now your Honor's ruling is that because the Forest Service employees were what you termed "public firemen"——

The Court: What Justice Reed termed as "public firemen."

Mr. Marion: ——these other factors are superseded by and do not influence your decision.

The Court: That is right. If I have been—I have been seriously thinking during the last hour or two of the advisability of taking the matter under advisement and writing a written opinion—a temptation which has occurred to me before and up to now I have successfully resisted. I was getting very close to yielding to that temptation on this occasion, but finally concluded that I believe that it is to the best interests of all concerned that we speed on with the disposition of it, and my—I can only give you my honest, best judgment about it as I see it, and that is what it is, and I think that if you have a mind to do so, you can review that order very cheaply, inexpensively, and I [10] hope expeditiously, and if I am wrong, be back in a reasonably short time for a trial of the case on its merits.

Mr. Marion: I have in mind, your Honor, the possibility of filing an amended complaint to add a few more facts. That is something I will have to——

The Court: I won't enter an order until both sides have had a full opportunity to digest—if they

find my comments digestible—what I have said, not only with respect to the ruling just made, but earlier in the day, so that the Government may cogitate that phase of it as well as yourself, and then we will see what comes of that thought on your part.

If you decide that you want to apply for leave to file an amended complaint, I see no reason why that permission can't be granted you now to avoid the argument of the matter, if you desire to do it. Do you have any objection to granting such leave? (Addressing Mr. Cushman.)

Mr. Cushman: No, your Honor, I don't believe so.

Mr. Marion: I might say that in view of the clear manner in which your Honor has expressed himself, I doubt that an amended complaint would change your Honor's mind or change the question to be presented.

The Court: I doubt it myself, Mr. Marion. The concern I have about this part of it is that I would like, if the case is going to be reviewed, that it be reviewed in [11] a manner which will be helpful when you get a ruling. Do you understand what I mean?

Mr. Marion: Yes, I do.

The Court: In other words, if my decision would be reversed, I hope it would be reversed on something that would be basic so we will have something that would be helpful.

On the other hand, if it is sustained, that is the end of the case there. That is why I think if you

want to amend in some particular after thinking about it further, you think that you should amend, why do so and we will rehear the matter if necessary. Likewise, if there is any—if the Government feels that the record should be amplified in some manner, it will have leave to take whatever action it thinks advisable. Is that clear now?

Mr. Reifenberg: Yes.

The Court: Very well.

(Whereupon, further discussion was had, other matters were considered, and Court was adjourned at four-fifteen o'clock p.m.)

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

(At a later date this sheet was substituted for pp 12 thru 15 originally filed, per counsel's request.)

[Endorsed]: Filed January 20, 1954. [12]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 3533

RAYONIER INCORPORATED, a Delaware Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 2956

ARTHUR A. ARNHOLD, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and PORT ANGELES & WESTERN RAILWAY COMPANY, INC., a Delaware Corporation,

Defendants,

FIBREBOARD PRODUCTS, INC., a Delaware Corporation, and A. R. TRUAX, Trustee in Reorganization,

Additional Defendants.

TRANSCRIPT OF PROCEEDINGS

27th Day of February, 1954

Before: Honorable George H. Boldt,
United States District Judge.

Appearances:

LUCIEN F. MARION, ESQ.,
BURROUGHS B. ANDERSON, ESQ.,
Appeared on Behalf of the Plaintiff,
Rayonier Incorporated.

FRANCIS N. CUSHMAN, ESQ.,
Assistant United States Attorney.
ARNO REIFENBERG, ESQ.,
Assistant United States Attorney.
GUY A. B. DOVELL. ESQ.,
Assistant United States Attorney.
Appeared on Behalf of Defendant,
United States of America.

W. H. FERGUSON, ESQ.,
WILLIAM WESSELHOEFT, ESQ.,
Appeared on Behalf of Plaintiffs,
Arthur A. Arnhold, et al.

DONALD A. SCHMECHEL, ESQ.,
Appeared on Behalf of Defendant Port
Angeles Western Railroad Company.

ALTHA P. CURRY,
Appeared on Behalf of Defendant
Fibreboard Products, Inc.

(Whereupon, the following proceedings were had, to wit:) [3*]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

PROCEEDINGS

The Court: We will proceed to consider the motions in Arnhold and Rayonier vs. United States.

Mr. Cushman: Your Honor, I wish permission to continue orally the motion in the Rayonier case against the amended complaint and an amended complaint has also been filed in the Arnhold case in the last day or two and I didn't have time to get out a new motion for judgment on the pleadings against that complaint and—— [4]

* * *

The Court: I see. Very well, are you ready then to proceed? Do you want to proceed Mr. Marion?

Mr. Marion: Yes, your Honor. I wonder if I might, for the purposes of the record, ask Mr. Cushman to state his motion orally, reading from his prior motion but substituting the word "amended complaint" instead——

The Court: I think that would be a good thing to do. Do that Mr. Cushman. Then we will have——

Mr. Marion: There were two grounds, that is why I wanted to have it clear.

Mr. Cushman: (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the plaintiff fails to state a claim against the defendant."

The Court: You wanted to read "amended complaint." [6]

Mr. Cushman: I beg pardon. (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the amended complaint fails to state a claim against the defendant upon which relief can be granted.

"2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter in the action."

The Court: Very well. That motion will be allowed and will be——

Mr. Marion: That is in the Rayonier case.

May it please the Court, I will not repeat my prior arguments unless to the extent that your Honor requests further discussion of them. I will be brief.

I want simply to point out the changes which have been made in our complaint. The purpose of our amendments is not to change the fact, but simply to set forth the additional facts and to put the picture in proper perspective. I believe that Mr. Anderson of our office prepared and filed, and I think it has been submitted to you, a memorandum of the changes which have been made.

The Court: Yes, we made an analysis of the amended complaint and the copy that you supplied us and have marked [7] thereon the changes from the original and have studied and examined it so that I think in general terms I have in mind what you did by the amendments.

Mr. Marion: Well then, very briefly it is simply that,——

The Court: Yes?

Mr. Marion: ——to point out that the Federal Government here is a timberowner just as all other timber-owners are there and the men whom they employ. The district ranger and his subordinates are caretakers and custodians of the land; they have numerous duties, one of which is the same duty which any private timberowner would have. It is to watch out for fires and if fire occurs, to get on the job and do something about it. That the Forest Service does not have a fire department as such any more than any other timberowner has a fire department; that the timber industries being the main source of supply of wood in the Olympic Peninsula, everyone is interested in supressing fire, is willing to respond to the call of his neighbor and to lend himself and his equipment to fight the common enemy.

The Forest Service is no different from any other timberowner in that respect. The fire suppression plan which the Forest Service had was the same sort of a plan that other timberowners had. They have only a few men themselves but they know where to go to call on their neighbors, people [8] in private employ, equipment privately owned, and say, "Our common enemy is at work, come and respond," the Forest Service still in this case assuming exclusive supervision and control of the direction of the fire fighting activities.

The other major respect is in enlarging upon the delinquency of the Forest Service and its employees in tolerating fire hazards both as to hazardous con-

ditions and hazardous practices upon their lands by the Port Angeles Western Railway, and additional allegations of negligence in their failure to take or cause to be taken steps to abate those hazardous conditions and practices.

These points are designed to clear the record that this is not a fire department, that the Government is a landowner, landowner and timber-owner and operates for pecuniary gain and profit, that they have the same duties, obligations that any other landowner does, are responsible for conditions on their lands and lands over which they have control including the railroad right-of-way, and that under the laws of the State of Washington, they should respond just as a private individual would respond in the same circumstances.

Now, unless your Honor desires further argument, I don't propose to take any more of your time. I think that may—whether it may alter your Honor's thinking because of the change of emphasis in our original complaint—we did [9] not make clear the fact that fire fighting was only one of many duties of the district ranger—whether that would alter your Honor's thinking under the circumstances, I don't know, but that in essence is the nature and reason for the changes which we have made.

The Court: I would not want you to think or anyone else that I have not given the matter very full and serious and earnest thought. I have. But the fact of the matter is, I do not think that any extended argument would change our view and——

Mr. Marion: If I may interrupt, your Honor?

The Court: Yes?

Mr. Marion: May I suggest this, before your Honor makes a formal ruling in our case. Mr. Ferguson, representing the plaintiffs in the related case, the Arnhold case, would like to be heard at some length, and since the issues are fundamentally the same, perhaps he can add further light to your Honor's thinking on it.

The Court: Very well. I will summarize the matter at the moment then by saying that as I understand the new allegations of your amended complaint in the Rayonier case, they in no manner withdraw from the allegations that on the previous hearing I considered constituted Floe and his people public firemen.

The other allegations, new allegations, simply [10] enlarge and state in more detail the allegations you rely on for constituting the Government ownership a private or nongovernmental ownership, if I may put it that way, stating the Government as being in a proprietary capacity with respect to the ownership of these lands.

In general I think that is correct, is it not?

Mr. Marion: That is correct in general, your Honor.

The Court: So the question for me then in your case is, would the enlarged allegations concerning proprietary capacity change my view of the controlling effect of the Dalehite case with respect to public firemen, or to, to put the same question another way, would the fact that a public fireman

was putting out fire on proprietary lands of the Government rather than on non-proprietary lands of the Government, change the result? At least that is the way I view it. I won't rule on it now. That is the way—that is the way I see the amended complaint as contrasted to the situation that was presented with the first complaint.

Mr. Marion: And also, to be a little clearer as to your Honor's thinking, your Honor is cognizant of the facts as enlarged here, that the district ranger and his subordinates were not maintained there for the purpose of fighting fires. That is one of many duties.

The Court: I have that. [11]

Mr. Marion: Not their primary duty.

The Court: I have that in mind.

Mr. Marion: I have nothing further then.

The Court: Very well, I will be glad to hear from Mr. Ferguson then.

(Whereupon, oral argument by Mr. Ferguson was had.)

The Court: Incidentally, I have just glanced through this file and I don't think that the Government ever filed a motion to dismiss in the Arnhold case. I don't believe there has ever been one filed there. Now, is it stipulated that you are now moving in the Arnhold case 2956?

Mr. Cushman: There seems to be some confusion. Mr. Reifenberg says I did file a motion for judgment on the pleadings.

The Court: Regardless of what my understand-

ing is, to clarify the situation now, whether or no the motion is in the file—I may have missed it, it is a very deep file with all these amended pleadings and I could have missed it, but whether or no it is there, do I understand that the Government——

Mr. Cushman: Yes.

The Court: ——in Cause No. 2956 moves for summary judgment of dismissal on the pleadings as to the Government [12] in those cases, is that right?

Mr. Cushman: Yes, your Honor.

The Court: In that case——

Mr. Cushman: The motion is filed and I believe it is probably in the Clerk's Office in Seattle.

The Court: It may well be, but regardless of that, is that your position now?

Mr. Cushman: Well, my position was for a motion for judgment on the pleadings and I believe that should be treated as a motion for summary judgment.

The Court: That is right, and so whether or no it is or is not in the file, that is what you now move and in the same terms that you stated when you made your motion in the Rayonier case, is that right?

Mr. Cushman: Yes, your Honor.

The Court: Now, if there is not any motion on file, is there any objection to my treating the matter as being presented on such a motion now at this time?

Mr. Ferguson: I am not making any technical objection.

The Court: I understood you were not, but just to clarify the record. I glanced through here and couldn't seem to find one. Mr. Foss looked and he couldn't find it, but it may well be there somewhere.

I understand that you had reference here to [13] this case in the Eighth Circuit, National Manufacturing Company and others, apparently a very recent decision of the Eighth Circuit, February 8th.

Mr. Ferguson: You mean the Missouri River Flood case?

The Court: The Flood case.

Mr. Ferguson: Yes, I'd like to take a minute on that if you'd like.

The Court: Well, I am not going to predicate my ruling on that case excepting only just in passing to say, and you may comment on this, that it seems to me that the philosophy in back of this decision supports the Government's contention in the present case.

Mr. Ferguson: May I answer that?

The Court: Yes.

(Whereupon, further oral argument by Mr. Ferguson was had.)

The Court: This is the second very able and thoughtful argument that has been presented to me to sustain the right of action contended for by the plaintiffs in these two cases. I have been very impressed by the argument and I will merely say of the argument this morning, that the doubt that I expressed at the commencement of my remarks on

January 17th may be somewhat deepened, but not to the point where I feel it requires a change in the ruling. [14]

Extended comment, I think, is not necessary, but perhaps just a word or two to indicate my thought. I am well aware of the important factual differences between the Dalehite case and the present case and between the Eighth Circuit National Manufacturing Company case and in fact all of the other cases that have been cited with the instant case. Nothing has been cited that is closely similar to our situation here in my opinion on the facts. And I will readily agree with Mr. Ferguson and repeat here what I said before, namely, that unfortunately the language of the majority opinion in the Dalehite case in so far as it bears on our problem is in itself not free from doubt, to put it at a minimum. Nevertheless, after giving this matter a very great deal of thought, I am satisfied that the basic philosophy supporting the majority decision in the Dalehite case, and a little more fully expressed in the Eighth Circuit case, requires, if followed, a granting of the motions to dismiss in the present case.

I should say that of course I did not undertake on January 17th at the conclusion of the previous argument to state all of the considerations that I had in mind, and I recognized then and I recognize now that the particular thing that I commented on at that time might have seemed to be a rather shallow analysis of the Dalehite opinion as it related to our present case. I am not going to attempt to elaborate [15] further on it now because in the last

analysis I am satisfied the decision will not be predicated on what I think or say about it if the case is reviewed. I merely meant in all fairness to indicate that I had that thought in mind.

I will say just one further thing. In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps more literally correct statement of it, between the situation of real property owned by the Government and real property owned by an individual.

If we take the literal language of the Federal Tort Claims Act, it is very hard to justify on any logical basis that there is any distinction. I grant you that, but I am satisfied that public consideration, the serious implications that would flow from a failure to make such a distinction will dictate that such a distinction be drawn. If so, of course there, as far as I know, never has been any right of action against the state authorized by Washington law or any other state law as far as I know for negligence in the keeping of publicly-owned land, and I have an idea that that is the analogy that will be laid as a test for this situation rather than the strict analogy of a purely private individual owning forest lands in the State of [16] Washington.

But whether or no that ultimately be the case, in my own mind I feel obliged to grant the motions on the strength of the philosophy of the Dalehite

decision, and that is what the ruling of the Court will be.

Mr. Marion: Your Honor, I would like to ask Mr. Cushman's agreement—I mentioned this to him before—to put in the record those two aerial photographs which I had on the easel at our previous hearing, my point being that in reviewing this I thought the Court of Appeals would be aided by having that visual reproduction.

The Court: I am sure they would, and is there any objection to that?

Mr. Cushman: Your Honor, I don't believe we have any objection. That will help them on a factual basis.

The Court: I'd be prepared to overrule your objection if you had one because I think it is a proper thing to do and you may do it in such manner as you think best by designating them as Exhibits A and B to be attached to the complaint if you want, or in any other suitable manner that you——

Mr. Marion: I would like since there are already exhibits attached to the complaint—I think there are A and B already. I suggest they be given C and D if I may.

Now I'd like to offer for the record for the [17] purpose of visual aid and understanding to the Court, as Plaintiffs' Exhibit C, an aerial photograph bearing the legend "Rayonier, Inc., Mosaic of Calawah Fire Damage, scale one inch to twelve thousand feet"; date is 1951, the photograph being prepared by Carl M. Berry of Seattle.

By way of explanation of this exhibit, the parties

preparing this mosaic have outlined in red the close proximate boundaries of the fire occurring on and after September 20, 1951. That red line does not include the boundary of the sixteen hundred acre area which burned prior to that date.

May I call your attention, Clerk, this is Cause 3533.

I also offer in the same manner Plaintiff's Exhibit D which is an aerial photograph of the place of the origin of the fire on August 6, 1951, and the greater portion including all of the westerly portion of the sixteen hundred acre area which is referred to in the complaint, this aerial photograph bearing the date October 7, 1951, and being a scale of one inch to four hundred feet.

The Court: The same will apply to that exhibit.

Mr. Cushman: Your Honor, I wish to move to enter the cooperative agreement between the Forest Service——

The Court: You wish to what?

Mr. Cushman: I wish to have attached, if the Court will permit it, Exhibit, I mean the agreement between the [18] State of Washington and the Forest Service, cooperative agreement as referred to in both complaints, and I believe by stipulation that all parties are agreed.

The Court: Very well. Why don't you, to avoid complications, why don't you attach it as another exhibit in the same category as we have done here?

Mr. Marion: That is perfectly all right.

The Court: If you don't object to that. Now if you prefer it some other way, I am not trying to

impose my ideas on you. I am trying to get at it in the manner least cumbersome for the record.

Very well, let this item now be marked accordingly, whatever the next letter would be, Mrs. Freeny.

The Clerk: Yes, your Honor.

The Court: And treat it exactly as you do the photographs that Mr. Marion left with you. Do you follow me?

Are you going to attach something more?

Mr. Cushman: I wish to offer this and I believe there will be objection to it. Other parties have copies, your Honor. No, I will take that back. I wish to offer this only in the Rayonier case. It is offered for the purpose——

The Court: Have it tagged or something, Mr. Cushman, so we know what we are talking about.

The Clerk: This is 3533 and a defendant's exhibit? [19]

Mr. Cushman: Yes, Defendant's Exhibit 1.

The Clerk: I shall mark it as 1. Defendant's Exhibit 1 in Cause 3533 has been marked for identification.

The Court: Now, what is your——

Mr. Cushman: Your Honor, that exhibit is an affidavit made by Mr. Evans of the Forest Service showing in his opinion that the fire started on the railroad right-of-way. I offer this in support of one of the major arguments in my brief that there is no duty on the Forest Service because the fire originated on property in another party's control. Now,

Mr. Marion will have something to say on this affidavit.

The Court: Yes?

Mr. Marion: The plaintiff objects to the admission of this, your Honor, as being in effect contravention of the allegations in the complaint, not by way of enlargement of the facts, but in a challenge to the sufficiency of the complaint. I believe all of the facts properly plead in the complaint must be accepted as true.

This affidavit of Mr. Evans which counsel has offered states that Mr. Evans arrived at the point of the first fire on August 6th, the fire which ultimately spread and went into the sixteen-hundred-acre area. He arrived there about two-thirty p.m.

Mr. Cushman: If I can shorten this, your [20] Honor—do you controvert the facts stated in that affidavit?

Mr. Marion: No, I do not. All this does, it tells that Mr. Evans arrived two hours after the fire started, that he says the fire at that time lay in a certain direction and that two hours after the fire the wind was blowing from a certain direction. Therefore it is his opinion that the fire originated on the railroad right-of-way and close to the tracks.

The reason Mr. Cushman offers this, I believe, is that our complaint says the fire started on or in the vicinity of the right-of-way and the point is that the whole of the land is owned and under the control of the defendant. Mr. Cushman makes a point of distinction between the right-of-way of the railroad and other land owned by the defendant

outside of the right-of-way, and this affidavit contains merely Mr. Evans' opinion that the fire did start on the right-of-way. To that extent it is offered for the purpose of taking issue with the statements set forth in the complaint that it was on, in or near the vicinity of the right-of-way.

The Court: If it had been presented at the prior, prior to the argument of the motion, I would not, of course, give it any consideration if it bore on a controverted issue of fact. As I conceive the function of the Court on a motion to dismiss, is not to determine controverted issues of fact but to act, to rule only on the facts that are [21] indisputably shown by the record. It would seem to me then that in so far as this affidavit controverts the second portion of your allegation, namely, the portion about being in the vicinity, that it does state a—it does involve a matter of controverted fact. I think I should allow the affidavit to be filed, but I will reject it as being made a part of the record that I am considering. You will have it in the file and can take, review any —if my action is incorrect there will be available to you means of reviewing it.

Mr. Cushman: Your Honor, I primarily offered it because the Arnhold case has admitted facts and if possible we could establish the same facts in both.

Mr. Schmechel: I take it it is being offered simply in the Rayonier suit?

Mr. Cushman: Yes. Your Honor, the agreement between the State of Washington and the Forest Service has been offered for use, for consideration in both cases.

The Court: Yes, so I understood. There was no objection, was there?

Mr. Cushman: No, no objection.

The Court: Are you satisfied the record is clear on what has been done now?

Now next when will you be able to present your, the order? [22]

Mr. Marion: If we might have a few moments to review each others'——

The Court: Yes. While you are reviewing, may I ask one other thing, you might want to talk about that as well. In a case of this magnitude and importance, not only to the litigants, but generally to law, I would have much preferred taking the case under advisement and taking time to write and polish up an opinion, which perhaps is what I should have done anyway, but in order to expedite this disposition of the case, I ruled on January 17th orally and here again I have done likewise. Yet it seems to me desirable, that for whatever it is worth, my views ought to be made a part of any record that may be taken on appeal. I presume you have in mind doing that?

Mr. Marion: Yes.

(Whereupon, counsel conferred.) [23]

* * *

Mr. Marion: One other matter. In the [24] Rayonier case—I think it would also be true in the Arnhold case—the defendant's motion to dismiss was based on two grounds: one, no claim was stated, the other, the Court lacks jurisdiction. Do I as-

sume that your Honor denies the motion on the ground that the Court lacks jurisdiction?

The Court: That is right.

Mr. Marion: That is the basis on which we have prepared this order.

* * *

(Whereupon, discussion was had concerning the entering of the order.)

Mr. Marion: For the purpose of the record, I also wish to state that Rayonier Inc. does not wish to amend further and will stand on its amended complaint.

The Court: Very well. The order appears to me to [25] be in proper form. Do you have any objection to the form of the order now, Mr. Cushman?

Mr. Cushman: Well, your Honor, I don't believe that the first ground is well taken. I believe the Court should deny this motion because the Court lacks jurisdiction since the matter does not come within the Tort Claims Act, and that is it.

The Court: The point hasn't been presented to me at all in the argument.

Mr. Cushman: Pardon?

The Court: I didn't understand that the point had been presented to me in the argument at all. Perhaps inferentially it was, but I didn't so understand it.

Mr. Cushman: Perhaps I am confused, your Honor.

The Court: Maybe it is another way of saying the same thing.

Mr. Cushman: Our original motion had two grounds.

The Court: Oh, yes, of course, but I understood that the ground—that you were receding from the first ground but that the ground that was being urged was the old traditional "not sufficient facts to constitute a ground for relief."

Mr. Marion: Your Honor, if you have no jurisdiction I don't believe your Honor could rule on the other ground.

The Court: I wouldn't think so too. That is [26] my impression. I think the order is in proper form. I am going to enter the order as now presented. It is signed, the Clerk is directed to enter it.

(Whereupon, discussion was had concerning entering of the order in the Arnhold case.)

The Court: We will draft an order in that—according to your stipulation just stated on Monday, and I will sign it and enter it without any further proceedings. Is that agreeable to both of you?

Mr. Cushman: Yes, your Honor.

Mr. Ferguson: Yes.

The Court: Very well. Is there anything further to be done then today?

Mr. Marion: Thank you very much for your very courteous——

The Court: We will now adjourn.

(Whereupon, Court was adjourned at twelve-five o'clock p.m.) [27]

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

Plaintiff having duly and properly filed in the above-entitled cause its Amended Complaint, and defendant having duly filed its Motion to Dismiss directed against said Amended Complaint, said motion came regularly on for hearing this day before the Honorable George H. Boldt, judge of the above-entitled court. Defendant appeared by Assistant United States Attorney F. N. Cushman, and by Assistant United States Attorney, Department of Agriculture, Arno Reifenberg; the plaintiff appeared by its attorneys, Lucien F. Marion and Burroughs B. Anderson. The Court having heard arguments of counsel and being advised in the premises,

It Is Ordered as follows:

1. Defendant's Motion to Dismiss the action on the ground that the Court lacks jurisdiction over the subject matter of the action is denied.

2. Defendant's Motion to Dismiss the action because the Amended Complaint fails to state a claim

against the defendant upon which relief can be granted, is hereby granted and, plaintiff having elected to stand on said Amended Complaint, said Amended Complaint is hereby dismissed with prejudice.

Done in Open Court this 27th day of February, 1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ LUCIEN F. MARION,
Of Attorneys for Plaintiff.

[Endorsed]: Filed February 27, 1954.

Entered March 1, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is given hereby that Rayonier Incorporated, the plaintiff named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in this action on February 27, 1954.

Dated this 24th day of March, 1954.

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON,
Attorneys for Appellant,
Rayonier Incorporated.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO TRANSMIT ORIGINAL EXHIBITS TO COURT OF APPEALS

Upon motion of Rayonier Incorporated for an order directing the Clerk of this Court to transmit to the United States Court of Appeals for the 9th Circuit certain original exhibits in this cause; and it appearing to the Court that the United States of America has no objection thereto; now, therefore,

It Is Hereby Ordered that the Clerk of this Court shall transmit to the United States Court of Appeals for the 9th Circuit the following original exhibits in this cause; to wit:

1. Plaintiff's Exhibits "C" and "D"; and
2. Defendant's Exhibit No. 2;

at the same time the said Clerk transmits to the said Court of Appeals the record on appeal in this cause.

Done in open court this 8th day of April, 1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON.

Approved for entry by the Court:

CHARLES P. MORIARTY,
United States Attorney;

By /s/ F. N. CUSHMAN,
Assistant United States
Attorney.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Order Granting Motion to Dismiss filed February 27, 1954, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, said papers being identified as follows:

1. Complaint, filed July 24, 1953.

2. Marshal's Return on Summons, filed July 28, 1953.

3. Appearance of defendant, filed Sept. 18, 1953.

4. Motion to Dismiss, filed Oct. 13, 1953.

5. Copy of Motion to Consolidate with Cause No. 2956 for Trial, filed Dec. 17, 1953.

6. Copy of Plaintiff's Brief on Motion, filed Dec. 17, 1953.

7. Notice of Motion to Consolidate, filed Dec. 17, 1953.

8. Brief of Deft. in Support of Motion to Dismiss, filed Jan. 8, 1954.

9. Notice of Hearing Motion to Dismiss, filed Jan. 12, 1954.

10. Reply to Ptff's Answering Brief, filed Jan. 15, 1954.

11. Court Reporter's Transcript of Court's Oral Remarks on Jan. 18, 1954, filed Jan. 20, 1954.

12. Amended Complaint, filed Feb. 19, 1954.

~~13. Affidavit in Support of Motion to Dismiss, filed Feb. 27, 1954.~~ (Marked as Deft. Ex. 1. Denied —not sent up. Excluded by order.)

14. Order Granting Motion to Dismiss, filed Feb. 27, 1954.

15. Court Reporter's Transcript of Proceedings, filed March 24, 1954, covering date of Feb. 27, 1954.

16. Notice of Appeal, filed March 24, 1954.

17. Bond for Costs on Appeal, filed March 24, 1954.

18. Motion to transmit original exhibits, filed April 8, 1954.

19. Order to Transmit Original Exhibits: Ptff's

C and D, and Defendant's No. 2, filed April 8, 1954.

Plaintiff's Exhibits "C" and "D," and Defendant's Exhibit No. 2.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 21st day of April, 1954.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14329. United States Court of Appeals for the Ninth Circuit. Rayonier Incorporated, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 23, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14329

RAYONIER INCORPORATED, a Delaware Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely on this appeal are as follows:

1. The amended complaint states a claim against the United States upon which relief can be granted under the Federal Tort Claims Act.

2. The Federal Tort Claims Act states that the United States shall be liable in tort "* * * in the same manner and to the same extent as a private individual under like circumstances * * *" (28 U. S. C. Sec. 2674) and "* * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U. S. C. Sec. 1346). A private individual standing in the place of the United States under the circumstances alleged in the amended complaint would be liable to appellant under Washington law.

3. The claim stated in the amended complaint does not fall within any of the exceptions to liability specified in 28 U. S. C. Sec. 2680.

4. The Federal Tort Claims Act waives all sovereign immunity from liability for tort except in the specific situations enumerated in 28 U. S. C. Sec. 2680. Immunity based on performance of a governmental function, as distinguished from a proprietary function, is not recognized or permitted under the Act except in those limited instances and functions specifically described in Section 2680.

5. Even if immunity from liability exists for torts committed in performance of a governmental function, that is immaterial in this case because the acts and omissions complained of were pursuant to a proprietary function on lands owned and operated by the United States for pecuniary gain and profit.

6. Appellee owed a duty to appellant, which it failed to meet, under common law, under the statutes of the State of Washington, and under contract between appellee and the State of Washington.

a. Under common law, if defendant's conduct threatens harm to plaintiff which a reasonable man could foresee, the defendant owes plaintiff a duty. This duty existed in appellee both as a landowner and as a volunteer. This principle applies with even greater force where the acting party (as in the case at bar) has superior knowledge of the possible harm.

b. Appellee, as an owner and operator of lands and timber, had duties under Remington's Revised Statutes, Secs. 2523, 5806, 5807 and 5818.

c. Appellee had a duty under its contract with

the State of Washington (Defendant's Exhibit No. 1) to fight and suppress the fire. It is immaterial whether appellant could sue under the contract. Appellee's duty extends to appellant.

7. Dalehite vs. U. S., 346 U. S. 15, 97 L. Ed. 1427, relied upon by the District Judge, is not applicable to nor controlling of the case at bar.

8. Appellee's employees were not "public firemen" nor did they constitute a "fire department." Even if they were, that is immaterial under the circumstances and because of appellee's duties and obligations as a land and timber owner and because of the nuisance existing on appellee's lands.

9. "The vastness of the public domain and the tremendous properties owned by the Federal Government" does not justify a distinction "between the situation of real property owned by the Government and real property owned by an individual" as indicated by the District Judge.

10. The District Court erred in granting the motion to Dismiss the amended complaint on the ground that it failed to state a claim against appellee upon which relief can be granted.

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO ITEMS IN RECORD ON APPEAL TO BE PRINTED BY THE CLERK

It is hereby stipulated by and between the parties hereto that the printed record on appeal herein shall consist of the following items. The instrument numbers referred to hereinafter are the numbers by which the Clerk of the District Court, in his certificate transmitting all of the original file in this cause to this Court, identified each of the documents and papers therein. Said instrument numbers appear also at the lower right hand corner on the face of each of such instruments in said original file.

1. Amended Complaint and Exhibits "A" and "B" attached thereto and incorporated by reference therein (Instrument No. 12, filed February 19, 1954).

2. The following portions of the Transcript of the Court's Oral Remarks in the proceedings in the District Court on January 18, 1954, at Seattle, at which time a hearing was had on the Government's Motion to Dismiss the original Complaint (Instrument No. 11, filed February 20, 1954):

(a) Pages 1 through 11, inclusive (Note—omit from printing pages 12 through 15, inclusive, of said Transcript as filed in this cause on January 20, 1954, and substitute in lieu thereof the following item (b));

(b) Substitute page 12 bearing the court re-

porter's certificate (Note—this substitute page 12 was filed by the court reporter at counsel's request subsequent to January 20, 1954, but was filed so as to be included as a part of Instrument No. 11).

3. All of the Transcript of Proceedings in the District Court on February 27, 1954, at Tacoma, at which time a hearing was had on the Government's oral motion to dismiss the Amended Complaint (Instrument No. 15, filed March 24, 1954), excepting only the following portions thereof:

(a) Omit that portion which commences at the start of line 10 on page 4 and terminates at the end of line 8 on page 6.

(b) Omit that portion which commences at the start of line 17 on page 23 and terminates at the end of line 24 on page 24.

(c) Omit that portion which commences at the start of line 9 on page 25 and terminates at the end of line 19 on page 25.

4. Oral Motion to Dismiss Amended Complaint. This motion was made during the February 27, 1954, hearing and is found in the Transcript of Proceedings thereof (Instrument No. 15 and item No. 3 above) on page 7, lines 1 through 11.

5. Order Granting Motion to Dismiss entered on March 1, 1954 (Instrument No. 14, filed February 27, 1954).

6. Notice of Appeal (Instrument No. 16, filed March 24, 1954).

7. Order Authorizing Clerk to Transmit Original Exhibits to Court of Appeals (Instrument No. 19, filed April 8, 1954).

8. Statement of Points on Which Appellant Intends to Rely (mailed to you herewith in accordance with Rule 17(6)).

9. This Stipulation as to Items in Record on Appeal to be Printed by the Clerk.

Dated this 27th day of April, 1954.

CHARLES P. MORIARTY,
U. S. Attorney;

By /s/ F. N. CUSHMAN,
Assistant United States
Attorney.

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,

/s/ LUCIEN F. MARION,

/s/ BURROUGHS B. ANDERSON,
Attorneys for Appellant.

[Endorsed]: Filed April 30, 1954.

[fol. 78] PROCEEDINGS IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[fol. 79] Before: BONE, ORR and HASTIE, Circuit Judges

ORDER OF SUBMISSION—July 25, 1955

Ordered appeal herein argued by Mr. Lucien F. Marion, counsel for the Appellant, and by Mr. Alan S. Rosenthal, Attorney, Department of Justice, counsel for the Appellee, and submitted to the Court for consideration and decision, with leave to counsel for the Appellee to file a reply memorandum in ten days.

[fol. 80] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 1, 1955

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 81] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,329

RAYONIER INCORPORATED, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Western District of Washington, Northern Division

OPINION—September 1, 1955

Before: BONE, ORR and HASTIE, Circuit Judges

ORR, Circuit Judge

Appellant filed an original and amended complaint in the trial court seeking to recover damages against the United States. The amended complaint, says appellant, alleges a cause of action within the area in which the United States has waived its sovereign immunity from suit under the Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-2680, § 1346. The damages claimed are for property losses.

On motion the trial court dismissed the action on the ground that the complaint failed to state a claim against the United States on which relief can be granted.

We summarize the pertinent allegations of the amended complaint. Appellee, hereafter Government, is and was at all material times the owner of vast timber forests situate on the Olympic Peninsula of the State of Washington. These forests are administered and patrolled by the Forest Service, a branch of the Department of Agriculture. The Port Angeles Western Railroad is the owner of various railroad rights of way across the public lands, which rights [fol. 82] of way are subject to a right of "control" and "free access" held by the United States. Appellant, hereafter Rayonier, is a Delaware corporation with extensive timberland holdings in the State of Washington, principally on the Olympic Peninsula.

On August 6, 1951, sparks emitted by a passing locomotive

ignited a fire along the railroad's right of way. The Chief United States Forest Ranger was immediately notified and assumed control of the fire fighting activities, which control he continued to exercise during the entire period of fire fighting. The fire spread first to sixty acres of public land, where it was confined until August 7th. It then flared up and spread to a 1600-acre tract, not alleged to be government owned. By August 11th the fire was "contained and controlled". It smouldered in the 1600-acre tract until September 20th. On September 20th it flared up again, escaped from the 1600-acre area and caused the alleged injuries to Rayonier's land.

It is further alleged that the Chief Forest Ranger committed numerous wrongful acts and omissions in the course of fighting the fire on the 1600-acre tract. The amended complaint avers that he failed to employ sufficient men and equipment although there was an ample supply available, and that the proper utilization of such available man power and material would have resulted in the extinguishment of the fire.

In addition, Rayonier seeks to predicate liability on the Government's alleged negligent failure to maintain the roadbed of the railroad in safe condition, its failure to maintain adjoining public lands in safe condition, its failure to perform the fire fighting duties required of a landowner, and its failure to fight the fire according to the duty of care which the law requires of a volunteer.

The crux of our inquiry is whether the allegations of the amended complaint brings the case within the ambit of the Tort Claims Act. The trial court in deciding that they do not relied upon the holding in the case of Dalehite v. United States, (1953) 346 U.S. 15. While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as negligence in failing to control the early [fol. 83] spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1600-acre tract, smouldered for more than a month, flared up again and reached appellant's

property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated.[1] Here the complaint alleges that the fire was "contained and controlled." It is alleged that men, equipment and water, for more than a month, were available to extinguish it. Failure to extinguish the fire is alleged to be due to the negligent refusal to employ the available resources and to use ordinary judgment. Paragraph XXXII of the complaint states that:

"The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951 and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by the District Ranger Floe and his subordinates."

On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Having reached the conclusion that failure to completely extinguish the fire after it had been contained within the [fol. 84] 1600-acre tract for approximately six weeks was the sole proximate cause of the injuries to appellant's prop-

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[1] "In general, when a third person becomes aware of the danger, and is in a position to deal with it, the defendant will be free to assume that he would act reasonably." Prosser, Torts, 1941, 367; Cook v. Seidenberg, 1950, 36 Wash. 2d 256, 217 P.2d 799; see, Crowley v. City of Raymond, 1939, 98 Wash. 432, 88 P.2d 858; Lehman v. Marryott and Spencer Logging Company, 1919, 184 P. 323. Cf. Pittsburg Reduction Co. v. Horton, 1908, 87 Ark. 576, 113 S.W. 647, and Ryan v. New York Central R.R. Co., 1866, 35 N.Y. 210, 91 Am.Dec. 49.

erty, we now give attention to the allegation that the failure to completely extinguish and contain the fire within said tract was due to the negligence of the fire fighters. These men were Forest Service Employees and functioning as public firemen. Under the circumstances was their employment such as to render the Government liable in the same manner and to the same extent as a private individual would be and thus within the provision of the Tort Claims Act, 28 U.S.C.A. § 2674?

In the Dalehite case, supra, the Supreme Court construed the act with reference to an analogous fact situation. There suit was brought to recover damages for negligence on the part of government officials in the manufacture and shipment of ammonium nitrate fertilizer. The fertilizer exploded while stored aboard ship in the harbor of Texas City, Texas. The Coast Guard attempted to put out the fire but failed. It was charged with taking inadequate measures to control the blaze. The Supreme Court denied relief. We set forth a portion of the opinion of the Supreme Court:

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

" '. . . the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' Feres v. United States, 340 U.S. 135, 142.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the Feres case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in [fol. 85] the law of torts it is the immunity of communi-

ties and other public bodies for injuries due to fighting fire. This case, then, is much stronger than Feres. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E. 2d 704. To impose liability for the alleged non-feasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics. We conclude that the Forest Rangers in fighting the fire acted in the capacity of public firemen. The Forest Service engages in extensive fire protection programs. It assists state foresters by subsidies and consultation; it conducts nationwide fire prevention campaigns; it carries on extensive research into techniques and devices for fire prevention and suppression. The service has entered into several agreements similar to the one alleged to be in force here whereby it assumes the state function of suppressing fires on all lands within a particular area, whether publicly or privately owned. We see no distinction between non-liability of the United States for negligence of the Coast Guard in fighting fires and analogous negligent conduct by the Forest Service. In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer.

We do not regard the fact that the United States had by prior agreement with the State of Washington undertaken to protect against forest fires as creating a distinction, rendering the Dalehite case inapplicable. In entering into the agreement, even if it be considered a binding contract (the complaint falls short of alleging a binding contract, and there is no allegation of consideration for the

Government's promise) the Government did no more than [fol. 86] undertake to perform services in a public capacity. Cf. National Manufacturing Co. v. United States, 8 Cir. 1954, 210 F.2d 263.

Having concluded that the alleged neglect of the firemen to use reasonable methods to control the fire within the 1600-acre tract was the proximate cause of the spread of the fire to appellant's lands, and that inasmuch as the fire fighters were acting as public servants to the extent that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act, we might well conclude this opinion. But Rayonier makes other claims which we proceed to discuss.

The principal allegations in this respect relate to the failure of the Government to keep the railroad right of way (the starting point of the fire) and adjoining public lands free and clear of inflammable material and, once the fire started, failure to take proper precautions to extinguish it before it reached the 1600-acre tract.

It is alleged that liability may be predicated on the Government's failure to maintain the Railroad's right of way in satisfactory condition. The right of way held by the Railroad was at least equivalent to an easement.[2] Ordinarily the servient estate is under no duty to make repairs, the duty resting on the dominant tenant who alone is liable for injury to third parties."[3] The allegation in the com-

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[2] Great Northern Ry. Co. v. United States, 1941, 315 U.S. 262;

Himonas v. Denver & R.G.W.R. Co., 10 Cir. 1949, 179 F.2d 171; see also,

Jones, Easements, 1898, § 208;

Tiffany, Real Property, 3rd ed. 1939, § 772, and cases cited.

As stated in Reed v. Alleghany Co., 1938, 330 Pa. 300, 199 Atl. 187, 189.

[3] See also, Herzog v. Grosso, 1953, 41 Cal.2d 219, 259 P.2d 429;

Strauss v. Thompson, 175 Kan. 98, 259 P.2d 145;

2 Thompson, Real Property, 1939, § 680;

3 Elliot, Railroads, 1921, § 1750;

Jones Easements, 1898, §§ 821, 831.

plaint that the Government had a right to enter and inspect the right of way does not alter this. Reservation of such a right is not equivalent to an assumption of the obligation to repair and maintain the right of way. The servient tenant does not undertake to clean up such rubble as the Railroad may accumulate. Cases dealing with the law of [fol. 87] landlord and tenant cited by the appellant are not persuasive, for example, see Appel v. Muller, 262 N.Y. 278, 186 N.E. 785.

The Government, under the allegations of the complaint, was an adjoining landowner to whose property fire, ignited on the property of a third party, has spread. At common law an adjoining landowner is not liable to third parties for failure to anticipate negligent acts of his neighbor and maintain and utilize his lands accordingly. Rayonier has cited no cases where such a liability was imposed. Cases such as Prince v. Chehalis Savings and Loan Association, 1936, 186 Wash. 372, 58 P.2d 290, aff'd. 186 Wash. 377, 61 P.2d 1374, cited by Rayonier deal with the liability of a landowner on whose property fire breaks out because of the existence of fire hazards and are distinguishable.

There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. In Leroy Fibre Co. v. Chi. M. and St. P. Ry., 1914, 232 U.S. 340, the United States Supreme Court held as a matter of law that plaintiff's stacking of inflammable flax near a railroad right of way did not constitute contributory negligence. This holding has been cited with approval and applied in recent cases.[4] Other recent cases apply a different rule.[5]

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[4] See Atlas Insurance Co., Ltd. v. State, 102 Cal.App.2d 789, 229 P.2d 13; and

Kleinclaus v. Marin Realty Co., 44 Cal.App.2d 733, 211 P.2d 582.

[5] See Stephens v. Mutual Lumber Co., 1918, 103 Wash. 1, 173 Pac. 1031, where failure on the part of the adjoining landowner to remove his property after notice of the outbreak of fire was held to bar his recovery, and

Nashville v. Nants, 1933, 167 Tenn. 1, 65 S.W.2d 189,

In Riley v. Standard Oil Co. of Indiana, 1934, 214 Wis. 15 252 N.W. 183, liability was imposed upon a person who neither started the fire nor owned the land on which it occurred. The court there accepted the jury's determination that the defendant, who had stored grease and oil in a warehouse next to a wide field of uncut grass despite knowledge that for over a year a fire had smouldered in a peet bog a short distance away, was liable to a plaintiff whose house was set afire by burning particles from [fol. 88] the defendant's warehouse. The defendant was held negligent for failure to cut the grass. That case is an extreme one. The point in question was assumed by the court without reference to authorities or arguments. The law has been traditionally reluctant to visit extensive liabilities on those directly responsible for the occurrence of fire. See Ryan v. N.Y. Central R.R.Co., 1866, 35 N.Y. 210. Cases dealing with contributory negligence are in conflict. In our opinion a failure to maintain safe conditions on property adjoining a railroad right of way does not render one liable for damages because the fire spread across his land to other land.

Appellant cites R.C.W. §§ 76.04.370 and 76.04.450, and §§ 5807 and 5818 Rem. Rev. Stats.[6] These provisions pur-

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[6] Rem. Rev. Stats. § 5807, and § 5818:

"§ 5807. Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 Pierce's Code), has been issued.

"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect

[fol. 89] port to impose liability on a private landowner for failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The Dalehite case, pp. 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions.[7]

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or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): Provided, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence."

"§ 5818. Forests and timber protected. All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary lines of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

[7] ". . . there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the

In the instant case the amended complaint predicates liability on the failure by the Government to take adequate steps to control the fire when it had spread to public lands and before it reached the 1600-acre tract. We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.

[fol. 90] Sec. 5806 Rem. Rev. Stat. of Washington,[8] R.C.W. 76.04.380, does not change the common law so as to impose

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FGAN constituted a nuisance, and in the contention of the petitioners here. We agree with the six judges of the Court of Appeals, 197 F.2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property or of engaging in an 'extra-hazardous' activity. United States v. Hull, 195 F.2d 64, 67."

[8] § 5806 Rem. Rev. Stat. of Washington, R.C.W. 76.04.380:

"§ 5806. Uncontrolled fires as nuisances—Abatement and lien for cost. Any fire on any forest land in the State of Washington burning uncontrolled and without proper precaution being taken to prevent its spread is hereby declared a public nuisance by reason of its menace to life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to control or extinguish it immediately, without

such a liability. The duty it imposes becomes operative upon the receipt of a written demand. The penalty exacted is reimbursement to the state of expenses incurred by it in fighting activities. A method of securing reimbursement is provided. No liability is placed on the landowner, with or without written notice, to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze.

The judgment of dismissal is affirmed.

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awaiting instruction from a forest officer, and if said responsible person, firm or corporation shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority, may summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt and, if the work is performed on the property of the offender, shall also constitute a lien upon said property. Such lien may be filed by the supervisor of forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

"When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies."

[fol. 91] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14329

RAYONIER INCORPORATED, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—September 1, 1955

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 92] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING EN BANC—October 14, 1955

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed September 30, 1955, and within time allowed therefor by rule of Court for a rehearing en banc, be, and hereby is denied.

[fol. 93] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 94] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: BONE, ORR and HASTIE, Circuit Judges.

ORDER GRANTING LEAVE TO FILE SECOND PETITION FOR REHEARING—December 27, 1955

Good cause therefor appearing, it is ordered that leave be and hereby is granted appellants to file a second petition for rehearing herein.